STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2003
v	No. 239692 Oakland Circuit Court
KOREY BERNELL SHAW, Defendant-Appellant.	LC No. 01-177975-FH

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The evidence showed that defendant's vehicle pursued complainants' vehicle for some distance. Defendant repeatedly shouted at complainants. Subsequently, defendant fired several shots at complainants' vehicle when both vehicles were stopped on an exit ramp. One shot struck the passenger door of complainants' vehicle. The police found a .40 caliber handgun in defendant's car and matching shell casings on the exit ramp.

Defendant requested that the trial court instruct the jury on self-defense. He asserted that the evidence could support an inference that he acted under duress. The trial court declined to give the instruction on the ground that the evidence did not show that complainants engaged in threatening behavior toward defendant.

The jury found defendant guilty as charged. The trial court sentenced defendant as an habitual offender to concurrent terms of three to fifteen years for assault with intent to do great bodily harm less than murder, two to seven and one-half years for carrying a concealed weapon, and two to seven and one-half years for felon in possession of a firearm, and to consecutive two-year terms for the convictions of felony-firearm.

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence

supports them. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

To be lawful self-defense, the evidence must show that: (1) the defendant honestly believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). A defendant's belief that he was in danger must have been honest and reasonable. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The reasonableness of a defendant's belief in danger must be measured by the circumstances as they appeared to the defendant rather than as they actually existed. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). Generally, a defendant must retreat if retreat is safely possible. *Canales*, *supra*. The exception to the duty to retreat extends only to a defendant's dwelling, *id*., 575, and is not applicable to the defendant's automobile. *People v Crow*, 128 Mich App 477, 487-488; 340 NW2d 838 (1983).

Defendant argues that the trial court erred by denying his request for an instruction on self-defense, because some evidence supported an inference that he acted in self-defense. We disagree. The evidence showed that defendant pursued complainants' car for some distance, and repeatedly shouted at complainants. No evidence suggested that complainants had any contact with defendant prior to the pursuit, or that complainants engaged in threatening behavior during the incident. No evidence supported an inference that defendant honestly and reasonably believed that he faced death or serious bodily injury, that he was required to take action immediately, or that he was not the initial aggressor. *George*, *supra*; *Green*, *supra*. Furthermore, no evidence showed that defendant was unable to drive away from complainants' vehicle. *Crow*, *supra*. The trial court did not err by refusing to instruct the jury on self-defense. *Canales*, *supra*.

Defendant next argues that trial counsel rendered ineffective assistance of counsel by failing to call him to testify regarding his state of mind during the incident. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant stated on the record that he chose to not testify, and that he made the choice freely and voluntarily. Defendant's wife, who was his passenger during the incident, asserted her Fifth Amendment right against self-incrimination. Trial counsel could not force either

defendant or defendant's wife to testify. Defendant has not pointed to any other evidence that counsel could have presented to demonstrate his state of mind during the incident. He has not overcome the presumption that counsel afforded effective assistance under the circumstances.

Defendant next argues that insufficient evidence was produced to support his conviction of assault with intent to do great bodily harm less than murder.[1] We disagree. In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do bodily harm to another, i.e., an assault; and (2) an intent to do great bodily harm less than murder. Assault with intent to do great bodily harm less than murder is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The requisite intent can be inferred from the surrounding facts and circumstances. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983). Given the difficulty of proving state of mind, minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

The evidence showed that defendant fired several shots at complainants' car from a short distance. One shot hit the passenger door. Evidence that an actor fired a gun in the direction of another person is sufficient to find that the actor had the requisite intent to do great bodily harm less than murder. The fact that the bullet did not hit the intended target is of no moment. *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992). The evidence, both direct and circumstantial, viewed in a light most favorable to the prosecution, supported defendant's conviction of assault with intent to do great bodily harm less than murder.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens

[1] Defendant does not make this argument with respect to any of his other convictions.